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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 435 and 436

KAISER ALUMINUM AND CHEMICAL CORP., *et al.*,

Petitioners,

—against—

BRIAN F. WEBER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, INC., AND ASIAN AMERICANS FOR EQUALITY AS *AMICI CURIAE*

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INDEX

	Page
Interest of Amici	2
Summary of Argument	4
Argument:	
I. Asian Americans Are a Racial Minority Historically Subject to Invidious Racial Discrimination and Exclusion Sanctioned by Law.	6
II. Asian Americans Are Still Subject to the Vestiges of Prior Racial Discrimination and Exclusion Compelled by Law.	23
III. Voluntary Affirmative Action Programs Are Necessary and Proper to Guarantee Equal Employment Opportunity for Asian Americans.	38
Conclusion	52

Table of Authorities

Page

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Chinese for Affirmative Action v. Federal Communications Comm'n, 16 E.P.D. ¶ 8290 (D.C. Cir. 1978) 27

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Gaston County v. United States, 395 U.S. 285 (1969) 46

Gong Lum v. Rice, 275 U.S. 78 (1927) 19

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Page

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Page

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Page

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Saunders v. Naval Air Rework Facility, N.D. Cal. Civ. Action No. C-74-0520 (1978) 28

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Page

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Page

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Statutes and Regulations:

Emergency School Aid Act of 1972, 20 U.S.C. § 1619(9)(A) 22

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Page

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1929 Cal. Stats., ch. 685, § 1 ... 18

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Page

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BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, INC., AND ASIAN AMERICANS FOR EQUALITY AS AMICI CURIAE

Interest of Amici

The Asian American Legal Defense and Education Fund is a non-profit corporation established under the laws of the State of California and New York in 1974. It was formed to assist Asian Americans throughout the nation in the protection of their civil rights, including the right to equal employment opportunity, through the prosecution of lawsuits and the dissemination of public information.

The Asian Law Caucus, Inc., is a non-profit corporation established under the laws of the State of California in 1972. It was formed to assist Asian Americans in the greater San Francisco Bay Area in the protection of their rights in employment, housing, immigration, governmental benefits

and criminal justice by providing legal and educational services.

Asian Americans For Equality is a non-profit corporation established under the laws of the State of New York and originally founded in 1974. It was formed to promote equal employment opportunity for Asian working people through educational and social action programs.

Amici have found that much of their work concerns discrimination on the basis of race and color and national origin in the field of employment suffered by Asians as a result of their historic exclusion from the mainstream of American life and the legacy of overt racial discrimination sanctioned by law. It is amici's experience that racial discrimination in the job market

and working place remains a persistent barrier for Asian Americans, and that voluntary affirmative action programs are necessary to overcome burdens on equal employment opportunity. Such programs, including programs in which Asians now participate, are clearly imperiled if the decision of the court below becomes the law of the land.

The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Historic legally-imposed exclusion from equal participation in the economic life of the nation remains substantially unremedied for Asians as well as members of other racial minorities. When each of the

principal Asian American groups--Chinese, Japanese and Pilipinos--in turn came into competition for employment with white labor, each was subject to imposition of invidious racial legislation, much like the Black Codes, in the western states, and national prohibition of naturalization and further immigration. These legal restraints have now lapsed, but their vestiges and inequality remain. The present status of the Asian minority illustrates the practical necessity for affirmative action programs in employment: Asian Americans earn less than white Americans even when their education and occupational attainments are greater. Governmental and private efforts to overcome the impact of legally compelled unequal employment

opportunity through affirmative action programs are therefore proper and necessary.

ARGUMENT

I. ASIAN AMERICANS ARE A RACIAL MINORITY HISTORICALLY SUBJECT TO INVIDIOUS RACIAL DISCRIMINATION AND EXCLUSION SANCTIONED BY LAW.

The circumstances giving rise to this Court's decision in Yick Wo v. Hopkins, 118 U.S. 356 (1886)--discriminatory exclusion of Asians from business enterprise and employment in the western states--were neither anomalous nor unusual. Instead, the ordinance regulating laundry buildings which San Francisco authorities administered "with an evil eye and an unequal hand" to exclude Chinese from an entire occupation, and for which "no reason for it exists except hostility to the race and national-

ity to which petitioners belong," 118 U.S. at 374, was but one, and by no means the most invidious, part of the structure of racial discrimination and exclusion sanctioned by law. The breadth and scope of the resulting legally-enforced badge of race and color has no parallel in our nation's history, except the Black Codes of the southern states which gave rise to the Fourteenth Amendment. Like the Black Codes, the primary objective of the laws to which Chinese, Japanese and other Asians were subjected was discrimination and exclusion in the area of livelihood. Indeed, the history of Chinese, Japanese and Pilipinos in the western states, to which they first came, is largely the history of legally-imposed exclusion from the mainstream of

economic life and restriction to separate and lesser employment opportunity. These laws included state and local prohibitions on business enterprise and employment, national prohibition of naturalization and further increase in their numbers, and segregation in public education, which is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment," Brown v. Board of Education, 347 U.S. 483, 493 (1954). This condition is not remote in time: legally-imposed discrimination and exclusion has faded in recent years, but the badge of race and color persists.

Substantial Chinese immigration began

in 1847, with most immigrants arriving as contract labor in mining, railroad, agriculture and other menial labor.[1] Chinese laborers were a significant and the largest racial minority throughout the western states. As the Chinese came into competition with whites for employment after 1860, they were excluded from most labor and forced by legal and extralegal means into ghettos in a few cities, notably San Francisco. By 1900, Chinese were either self-

1. The history of the Chinese in the West is set forth in M. Coolidge, Chinese Immigration (1909); E. Sandmeyer, The Anti-Chinese Movement in California (1939); S. Lyman, The Asian in the West 9-26 (1970); S. Lyman, Chinese Americans (1974); see also P. Chiu, Chinese Labor in California, 1850-1880 (1967); I. Light, Ethnic Enterprise in America: Business and Welfare Among Chinese, Japanese and Blacks (1972).

employed in laundries, restaurants, and stores serving the Chinese community or employed in the general labor market as domestic servants, cooks and gardeners. Chinese, like black persons, were prevented by racial discrimination from any entry into other kinds of employment until after the Second World War.

Japanese immigration began in the 1860's, and, as did the Chinese before them, Japanese worked in agriculture, railroad, mining and other menial work.[2/] Japanese were effectively restrained by legally-imposed discrimination to work in truck farming,

2. The history of the Japanese in California is set forth in Y. Ichihashi, Japanese in the United States (1932); R. Daniels, The Politics of Prejudice (1962); H. Kitano, Japanese Americans: The Evolution of a Subculture (1969).

gardening and self-employment serving the Japanese community in California. Pilipino immigration followed the Spanish-American War with their recruitment as farm laborers.[3/] Pilipinos, somewhat like the Japanese, were restricted largely to migratory farm labor in the large west coast farming areas until the postwar era.

At every step in the process of restriction of Asian Americans to a separate and unequal sphere of economic endeavor and employment, the force of law was resorted to.[4/] Thus, Chinese miners were forced

3. The history of the Pilipino in the continental United States is set forth in B. Laster, Filipino Immigration (1931); H. Melendy, Asians in America: Filipinos, Koreans and East Indians 17-110 (1977).

4. The history of legally-enforced discrimination and exclusion of Asians is set forth in F. Chuman, The Bamboo People:

(footnote continued on next page)

out of mining through imposition of a miner's tax enforced only upon them.[5] The California State Constitution of 1879 expressly forbade the employment of any Chinese, directly or indirectly, by any California corporation or governmental entity.[6] While that provision did not survive constitutional challenge, other prohibitive statutes and ordinances were widely enacted throughout the western

(footnote continued from previous page) The Law and Japanese Americans (1976); E. Sandmeyer, The Anti-Chinese Movement In California (1939); M. Coolidge, Chinese Immigration (1909). See generally, P. Murray, States' Laws on Race and Color (1951).

5. Foreign Miners' License Tax, Act of Apr. 13, 1850, ch. 97, § 1 et seq., 1850 Cal. Stat. 221. See M. Coolidge, Chinese Immigration 36 (1906).

6. California State Constitution of 1879, Art. XIX, §§ 2-3. See E. Sandmeyer, The Anti-Chinese Movement In California 71-74 (1939).

states.[7] Other statutes, particularly aimed at Japanese, restricted the ownership of land.[8] Moreover, these prohibitions were part of a system of laws that restrained Asians in the enjoyment of virtually every civil right, most notably

7. See, e.g., Idaho Constitution of 1890, art. 13, § 5 (public works); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco laundry building ordinance); In re Hong Yen Chang, 84 Cal. 163 (1890) (attorneys); In re Yamashita, 30 Wash. 234, 70 P. 482 (1902); Asakura v. City of Seattle, 265 U.S. 332 (1924) (pawnbrokers); Yamashita v. Hinkle, 260 U.S. 199 (1922) (incorporation of businesses).

8. See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1924) (California statutes). See generally M. Konvitz, The Alien and the Asiatic in American Law 157-70 (1946); McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947).

public education, infra.[9] As with other official racial segregation and discrimination, equally debilitating and pervasive private discrimination was fostered. Legally-imposed restrictions on livelihood did not end in the western states until

9. See, e.g., California Constitution of 1879, art. II (Chinese denied right to vote); Idaho Constitution of 1890 (persons of Mongolian descent prohibited from voting and serving as jurors); People v. Hall, 4 Cal. 399 (1854) and Speer v. See Yup, 13 Cal. 73 (1855) (Chinese prevented from testifying in courts); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Executive Order 9066, rescinded by Presidential Proclamation No. 2714 of Feb. 19, 1976 (Japanese placed in internment camps during World War II); Mississippi Constitution, art. 14, § 263 (1942); Miss. Code Ann. § 459 (1942) (marriages between white persons and Mongolians prohibited); Mont. Rev. Codes Ann. §§ 5701, 5702 (1935) (marriages between white persons and Chinese or Japanese void); S.D. Code § 14.0106 (1939) (marriages between white persons and Koreans, Malayans and Mongolians void); Utah Code Ann. § 40-1-2 (1943)(marriages between white persons and Mongolians prohibited).

the postwar era.[10]

The legal structure of discrimination and exclusion extended to prohibitions on naturalization and immigration.[11] Such laws and statutes were expressly intended to extinguish or limit Asian competition to white business enterprise and employment. They applied to each of the major Asian groups in turn, first the Chinese,[12]

10. See, e.g., Oyama v. State of California, 332 U.S. 633 (1948) (California Alien Land Law of 1920); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (commercial fishing license).

11. The history of the exclusionary laws is set forth in M. Coolidge, Chinese Immigration (1909); E. Sandmeyer, The Anti-Chinese Movement in California (1939); F. Chuman, The Bamboo People: The Law and Japanese Americans (1976); see generally F. Auerbach, Immigration Laws of the United States (1955); R. McKenzie, Oriental Exclusion (1971).

12. See The Chinese Exclusion Case, 130 U.S. 581 (1889); In re Ah Yup, 1 F. Cas. 223 (C.C. Cal. 1878); see also United States v. Wong Kim Ark, 169 U.S. 649 (1898) and cases cited therein.

the Japanese[13] and then Pilipinos.[14] The effect of this discrimination was national in scope: effectively branding every Asian on the basis of race and color and nationality an alien unfit for citizenship and further immigration. This historically unique restriction did not finally end until 1965.[15]

The history of public education for Asians in California is a "classic case of [the] de jure segregation involved in

13. See Ozawa v. United States, 260 U.S. 178 (1922); see also, Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq.

14. Philippine Independence Act, 48 Stat. 456 (1934).

15. Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1151-1156.

Brown v. Board of Education," Guey Heung Lee v. Johnson, 404 U.S. 1215, 1215-16 (1971) (Douglas, J., as Circuit Justice).[16] California's education law was formally amended in 1860[17] to permit separate schools for the education of "Negroes, Mongolians and Indians."[18] The consti-

16. The history of school segregation in California is reviewed in C. Wollenberg, All Deliberate Speed, Segregation and Exclusion in California Schools, 1855-1975 (1976) [hereinafter "Wollenberg"] and J. Hendrick, The Education of Non-Whites in California, 1849-1970 (1977) [hereinafter "Hendrick"]. Pertinent sources and studies are cited. See also M. Weinberg, A Chance to Learn (1977).

17. 1860 Cal. Stats., ch.329, § 8; see also 1863 Cal. Stats., ch.159.

18. See Wollenberg at 10-14.

tutionality of the separate school law was upheld in Ward v. Flood, 48 Cal. 36 (1874), but the statute was repealed for economic reasons.[19] Following unsuccessful efforts to exclude Chinese and Japanese children from public education altogether,[20] specific statutory authority was created for the establishment of separate schools for Chinese, Japanese and Indian children.[21] The constitu-

19. General School Law of California, § 1662 at 14 (1880); see Wollenberg at 24-26.

20. See, e.g., Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885) (Chinese); Aoki v. Deane (Japanese), discussed in Wollenberg at 48-68.

21. 1885 Cal. Stats., ch.117, § 1662 (Chinese); 1893 Cal. Stats., ch.193, § 1662 (Indians); 1921 Cal. Stats., ch.685, § 1 (Japanese). See generally Wollenberg at 28-107; Hendrick at 11-59.

tionality of the California Education Code was upheld in Wong Him v. Callahan, 119 F. 381 (C.C. Cal. 1902). These provisions were not repealed until 1947,[22] see Guey Heung Lee v. Johnson, supra, 404 U.S. at 1215.

Elsewhere, Asians were treated as "colored persons" subject to the same racial segregation imposed upon black school children, see, e.g., Gong Lum v. Rice,[23] 275 U.S. 78 (1927).

22. 1947 Cal. Stats., c. 737, § 1. The repeal was precipitated by Mendez v. Westminster School District, 64 F. Supp. 544 (C.D. Cal. 1946), aff'd, 161 F.2d 744 (9th Cir. 1947) (Mexican-Americans).

23. See generally J. Loewen, The Chinese in the Mississippi Delta (1973).

Notwithstanding the repeal of the California separate school law, "[j]udicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minorit[ies]," University of California Regents v. Bakke, __U.S.__, 57 L.Ed.2d 750, 822 (Brennan, J.).[23] In particular, there have been recent school desegregation decisions in areas of significant Asian school population, such as San Francisco, Los Angeles, Pasadena, San Diego, Oxnard and Stockton,[24] which include a substantial

23. See also Hendrick at 104-06; California State Dept. of Education, Racial & Ethnic Survey of California's Public Schools, Fall 1966, iii (1967).

24. San Francisco: Johnson v. San Francisco Unified School District, 339 F.
(footnote continued on next page)

majority of the entire Asian American

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Supp. 1315 (N.D. Cal. 1971), app. for stay denied, Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971), vacated & remanded, 500 F.2d 349 (9th Cir. 1974); San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 943, 92 Cal. Rptr. 309, 311, 479 P.2d 669, 671 (1971) (en banc), cert. denied, 401 U.S. 1012 (1971); Lau v. Nichols, 414 U.S. 563 (1974) (Title VI violation found).

Los Angeles: Crawford v. Board of Education, 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976); see Kelsey v. Weinberger, 498 F.2d 701, 704 n.19 (D.D.C. 1974) (HEW determination of violation of Emergency School Aid Act of 1972, 20 U.S.C. § 1600 et seq., noted).

Pasadena: Spangler v. Pasadena City Bd. of Education, 311 F. Supp. 501 (C.D. Cal. 1970); Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963).

San Diego: People v. San Diego Unified School District, 19 Cal. App.3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971) (14th Amendment violation), cert. denied, 405 U.S. 1016 (1972).

Oxnard: Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974), on remand from 488 F.2d 577 (9th Cir. 1973).
(footnote continued on next page)

population of the State.[25] Moreover, in 1972, Congress determined that Asians remain a group "who, as a result of language barriers and cultural differences, do not have equal education opportunity." Emergency School Aid Act of 1972, 20 U.SC. § 1619(9)(A).

(footnote continued from previous page) Stockton: Hernandez v. Board of Education of Stockton Unified School Dist., Civ. Action No. 101016, San Joaquin Super. Ct. (Oct. 9, 1974).

25. See California State Advisory Comm., U.S. Comm'n on Civil Rights, Asian-Americans and Pacific Peoples: A Case of Mistaken Identity 14-16 (1975).

II. ASIAN AMERICANS ARE STILL SUBJECT TO THE VESTIGES OF PRIOR RACIAL DISCRIMINATION AND EXCLUSION COMPELLED BY LAW.

While the express legal structure and sanction that "put the weight of government behind racial hatred and separatism"[26] has faded, its effects have not been eliminated root and branch. The legislative history of Title VII of the Civil Rights Act of 1964 clearly indicates that Congress recognized the need to protect Asian Americans against continuing employment discrimination. In the debates on the 1972 amendments to Title VII, Senator Williams noted that Asians and other minority workers had been "relegated to

26. University of California Regents v. Bakke, __U.S.__, 57 L.Ed.2d 750, 813 (1978) (Brennan, J.).

the lowest paying, least desirable jobs--if indeed, they get hired at all." 118 Cong. Rec. 294 (1972). Congress observed that such discrimination against Asians was based in part on their national origin, see, e.g., 117 Cong. Rec. 32094 (1971) (comments of Reps. Pucinski and Dent), and that, in addition, Asian women were likely to be "victims of double discrimination." 117 Cong. Rec. 32096 (1971) (comments of Rep. Abzug). Senator Cranston also remarked in a letter to the Civil Service Commission chairperson that the 1972 amendments to Title VII were designed to "deal with discrimination in Federal Government employment and to open up more high level positions for minorities, particularly Mexican-Americans, blacks,

Indians, Orientals and women." 118 Cong. Rec. 4933 (1972). Federal agencies charged with enforcement of Title VII, Executive Order 11246 and other civil rights guarantees have similarly included Asians as a group protected by anti-discrimination guarantees.[27]

27. See, e.g., 29 C.F.R. Part 1602 (Title VII employer reporting and record keeping requirements); 41 C.F.R. Parts 60-2 and 60-4 (Executive Order 11246 regulations for affirmative action programs); 28 C.F.R. Part 42 (LEAA regulations, see §§ 42.203(d) and 42.302(e)); 28 C.F.R. Part 42, subpart F (Justice Dept. Title VI guidelines for federal agencies, see §§ 42.402(e)(3)); 28 C.F.R. Chapter I, Part 50, § 50.14 (Justice Dept. federal executive agency guidelines on employee selection procedures, see § 50.14(4)); but see New York State Advisory Committee, U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 28, 45 (1977) (federal and local officials criticized for failure to recognize Asians as minority and to enforce civil rights statutes and laws).

It is the experience of amici that Asian Americans have been reluctant to assert their legal rights in court because they have historically been subjected to a wide range of legally-imposed discrimination.[28] However, an increasing number of employment discrimination cases have been brought in recent years by Asian Americans or in their behalf alleging discrimination in training,[29] hiring,[30]

28. Congress perceived the subtle nature of discrimination against Asian Americans today and their reluctance to seek legal redress, noting that "cases involving discrimination against Orientals have been practically invisible under Title VII." 117 Cong. Rec. 32096 (1971) (comments of Rep. Abzug).

29. E.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972) (union apprenticeship and training programs discriminate against black, Mexican, Oriental and other minority applicants).

30. E.g., Chinese for Affirmative Action
(footnote continued on next page)

promotions[31] working conditions[32] and terminations.[33]

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v. Federal Communications Comm'n, 16 E.P.D. ¶ 8290, at 5485 (D.C. Cir. 1978) (en banc) (Robinson, J., dissenting) (statistics established prima facie case of discrimination against Asian Americans by San Francisco television station); United Pilipinos for Equal Employment v. California Blue Shield, N.D. Cal. Civ. Action No. C 73-1085-CBR, consent decree approved Nov. 4, 1974 (Class of Asian Americans denied hiring and managerial and supervisory promotions); United States v. City of San Diego, S.D. Cal. 76-1093, consent decree approved Dec. 20, 1977 ; United States v. County of San Diego, S.D. Cal. 76-1094, consent decree approved May 6, 1977 (women, blacks, Hispanics and Asians claim discrimination in hiring for all county and all city positions except police); Officers for Justice and United States v. City and County of San Francisco, N.D. Cal. C-73-0657-RFP, C-77-2884-RFP (challenge to entry level and sergeants civil service examinations, and to failure to hire bilingual officers, includes Asians).

31. E.g., Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, __F.2d__, 17 E.P.D. ¶ 8518
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(footnote continued from previous page) (9th Cir. 1978) (Pilipino denied promotion to account executive); Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977) (Chinese political science professor denied tenure); Martinez v. Bechtel Corp., 10 E.P.D. ¶ 10,570 (N.D. Cal. 1975) (Class of Pilipino women denied promotion to higher-level management positions); National Organization for Women v. Bank of California, 5 E.P.D. ¶ 8617 (N.D. Cal. 1973) (Pilipinos included in consent decree requiring bank to establish affirmative action plan); Saunders v. Naval Air Rework Facility, N.D. Cal. Civ. Action No. C-74-0520, consent decree approved Sept. 28, 1978 (class of employees claiming denial of supervisory positions includes blacks, Mexican-Americans and Pilipinos).

32. E.g., Domingo v. New England Fish Co., 445 F. Supp. 421 (W.D. Wash. 1977) (finding of discrimination against Pilipino cannery workers in job placements and housing conditions).

33. E.g., Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975) (Chinese pharmacist allegedly terminated because of race).

Furthermore, demographic information establishes that while Asians are the racial minority which has made the greatest progress in the post-war era, discrimination still operates to significantly disadvantage Asian American employment opportunities.

In 1970, well over a third lived in California and well over a majority in the western states,[34] and estimates of all Asian groups in 1970 range up to

34. See U.S. Dept. of Health, Education & Welfare, Urban Associates, Inc., A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, Vol. II: Asian Americans 16-17 (1974) (HEW Publ. No. (OS) 75-121 (hereinafter "HEW Study")); see generally, U.S. Dept. of Commerce, Bureau of the Census, Census of the United States: 1970, Subject Reports, Final Report PC(2)-1G-Japanese, Chinese, and Filipinos in the United States (1973).

2,089,932.[35] The state of California estimates that between 1970 and 1977, the Asian American population doubled from 549,248 to 1,290,000 or 5.4% of the state's population, almost all in the San Francisco and Sacramento areas and Los Angeles and San Diego Counties where they form substantial minority populations.[36]

35. New York State Advisory Comm. to the U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 4 (Nov. 1977) (estimate including Chinese, Pilipino, Hawaiian, Korean, Japanese, Guamanian, Samoan, Malayn, Polynesian and Thai groups). It should be noted that the Asian population is undercounted by the Bureau of the Census, HEW Study at 4.

36. See U.S. Dept. of Transportation, Federal Highway Admin., F. Wu, P. Chen, Y. Okano, P. Woo, Involvement of Asian Americans in Federal-Aid Highway Construction 15-17 (March 1978) (hereinafter "DOT Study") (California's population in 1977 estimated to be 63.3% white, 17.6% Mexican American, 6.9% black, 5.4% Asian American, and 4.8% others).

In 1970, Asians were already 15.2% of the San Francisco County population and 3.5% of the Los Angeles population. New York City, the other area of Asian concentration, estimated that by 1975 the Asian American population had doubled since 1970 and that the Asian population was 2.9% of the total.[37]

The postwar era has seen Chinese, Japanese and Pilipinos entering the economic mainstream in greater numbers, but many Asians continue in traditional jobs to which they were once largely restricted by law. A quarter of Chinese men are employed as service workers in restaurants and laundries, and most Chinese in "mana-

37. See New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority, supra at 5.

gerial" positions are actually owners and proprietors of small retail and food stores or restaurants in Chinatowns throughout the nation.[38] 40% of Pilipino men work in traditional low-skilled, low wage menial laborer and service occupations, many as farm workers.[39] After wartime internment, Japanese were legally deterred from and did not return to traditional rural employment and enterprises.

The educational attainment of Japanese and Chinese Americans exceeds that of the population as a whole, although there has been a recent decline.[40] The higher

38. HEW Study at 91-92.

39. HEW Study at 93-95.

40. U.S. Comm. on Civil Rights, Social Indicators of Equality for Minorities and Women 9-16 (Aug. 1978) [hereinafter "CCR Study"]; HEW Study at 70.

level of educational attainment of these Asian groups distinguish them from other racial minorities.[41] However, on the occupational overqualification index, Asian Americans (except for Chinese males at the high school level), like other racial minorities, are more overqualified for their occupations than white persons. This is true of high school graduates in occupations typically not requiring a high school diploma and college graduates in occupations typically not requiring a college degree.[42] In addition, earnings tend to be higher for people with higher educational attainment for all groups, but all racial minorities, including Asians,

41. CCR Study at 10-15.

42. CCR Study at 17-22.

earn less than whites with the same educational attainment.[43] "In 1976, Japanese, Chinese and Pilipino Americans were much more likely to have completed a college education than majority males but, as college graduates, they earned far less than majority males."[44] Consistent with their higher educational attainment, more Chinese and Japanese men have prestigious occupations than other minority and white persons,[45] although Asian Americans exhibit as much or more occupational segregation as other racial minority groups.[46]

43. CCR Study at 22-27, 89.

44. CCR Study at 27.

45. CCR Study at 34-38, 90. But see supra at 31-32.

46. CCR Study at 39-44, 90 ("Occupational segregation" defined as degree of dissimilarity of occupations between minority groups and white persons measured by the percentage of a group who would have to change occupations in order to have the same occupational distribution as white persons).

For all minority groups, occupational segregation is increasing.[47] The family income of Japanese Americans exceeds that of white, other Asian and other minority groups, but after statistically equalizing levels of educational attainment, occupational prestige, age, hours and weeks worked, and cost of living in different localities, all racial minorities consistently earn substantially less than white persons.[48]

Other studies have made similar findings. A U.S. Department of Health, Education and Welfare study confirms that "when educational attainments are taken into account in all three Asian subgroups,

47. CCR Study at 39-44, 90.

48. CCR Study at 47-56, 90.

the proportion of workers employed in higher status jobs is not equal to the proportion in the total population" and that "it is easier for persons in the majority population to obtain employment in higher level jobs without a college degree than it is for the Asian Americans."[49] The HEW study also found an income lag for Asians with comparable education and occupation to that of whites, higher household income due to greater likelihood of both husband and wife working, and substantial pockets of poverty, particularly in San Francisco and New York City.[50]

49. HEW Study at 103; see id. at 82-103.

50. HEW Study at 104-131. The study also found higher income levels largely attributable to a greater proportion of Asians in Hawaii, where income and standard of living are higher, compare J. Young, Dis-
(footnote continued on next page)

Economic studies using various statistical models demonstrate that Asians have lower earnings because they receive lower returns from education than whites, are excluded from high earning occupations, do not advance at the same rate as whites in particular occupations, and experience greater unemployment, and that such disparities are not statistically accountable but for

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crimination, Income, Human Capital Investment And Asian-Americans 89-90 (1977). For statistics on urban Asian communities with indicia of economic and employment problems most similar to black and other racial minorities, e.g., San Francisco and New York City, see New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City (Nov. 1977); California State Advisory Committee, U.S. Comm'n on Civil Rights, Asian Americans and Pacific Peoples: A Case of Mistaken Identity (Feb. 1975).

racial discrimination.[51]

III. VOLUNTARY AFFIRMATIVE ACTION PROGRAMS ARE NECESSARY AND PROPER TO GUARANTEE EQUAL EMPLOYMENT OPPORTUNITY FOR ASIAN AMERICANS.

The American dream is not yet within reach of most Asian Americans. It is true that legally-imposed discrimination and exclusion has ended, that formal pro-

51. U.S. Dept. of Commerce, Manpower Admin., H. Wong, The Relative Economic Status of Chinese, Japanese, Black, and White Men in California (1974); J. Young, Discrimination, Income, Human Capital Investment, and Asian-Americans (1977); M. Katzman, "Opportunity, Subculture and the Economic Performance of Urban Ethnic Groups," 28 American J. of Economics & Sociology 351-366 (1969); M. Katzman, "Urban Racial Minorities and Immigrant Groups: Some Economic Comparisons," 30 American J. of Economics & Sociology 16-25 (1971); W. Fogel, "The Effect of Low Educational Attainment On Income: A Comparative Study of Selected Ethnic Groups," 1 J. of Human Resources 22-39 (1966).

hibition of discrimination on the basis of race and color is firmly established in American life, and that, compared to other racial minorities, Asian Americans have been better able to overcome obstacles to full participation in American life since the Second World War. However, although significant numbers of Asian Americans have overcome obstacles to achieve notable educational and occupational success, such success has not wholly extinguished the badge of inferiority of race and color. Indeed, there is no clearer demonstration of the intractability of state-imposed racial inferiority than the fact that the earnings and employment opportunity of Asian Americans remain less than that of white Americans despite

greater educational and occupational attainment. Therefore, affirmative action in employment is a necessary specific cure for remaining vestiges of legally-imposed exclusion of Asian Americans from full participation in the economic life of the nation.

For Asian Americans, affirmative action programs do no more than provide a specific remedy for the vestiges of the prior state-imposed discrimination and exclusion that effectively restricted Asians to restaurant, laundry, farm labor and other low-paying traditional occupations separate and apart from the dominant society, supra. Without such programs, Asian Americans, particularly blue collar workers, do not have access to many jobs,

especially skilled craft jobs such as the position in question in the instant case. For instance, Asians, like other minorities, have been unable to enter skilled trades in the construction industry in any appreciable numbers in areas of substantial Asian population because of racially exclusionary policies of construction unions; indeed, they are practically invisible, see, e.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972).[52] One study found that Asian participants in the Fed-

52. See also U.S. Dept. of Labor, Manpower Admin., B. Sung, Chinese American Manpower and Employment 184, 187-189 (1975) (San Francisco and New York City construction union statistics); see generally U.S. Comm'n on Civil Rights, The Challenge Ahead, Equal Opportunity in Referral Unions (1976).

eral Highway Administration highway construction-related trades and apprenticeship training, who successfully completed their training, nevertheless were unable to enter apprenticeship programs because of racial discrimination against Asians within the construction industry in California.[53] Another striking example is the recent protracted efforts of amicus Asian Americans for Equality, other groups and government agencies to convince builders and contractors to employ Asians in trainee construction jobs at Confucius Plaza, a federally-supported residential and commercial complex in the heart of New York City's Chinatown.[54]

53. DOT Study at 41-42.

54. See New York State Advisory Comm., U.S. Comm'n on Civil Rights, The Forgotten Minority, supra at 28-29.

For this reason, federal agencies charged with enforcement of civil rights statutes and executive orders have included Asian Americans among racial minorities for whom participation in voluntary affirmative action programs is deemed necessary. See, e.g., U.S. Department of Labor, Office of Contract Compliance, Affirmative Action Programs of Government Nonconstruction Contractors, 41 C.F.R. Part 60-2, effective July 1, 1968 (35 Fed. Reg. 2586), last amended October 20, 1978 (43 Fed. Reg. 49249 (§ 60-2.11(a)); Affirmative Action Programs of Government Construction Contractors, 41 C.F.R. Part 60-4, effective October 20, 1978 (43 Fed. Reg. 49254) (§ 60-4.3); see also 41 C.F.R. § 60.50.1(d); Law Enforcement Administration Agency,

Equal Employment Opportunity Program Guidelines, 28 C.F.R. Part 42, subpart E (43 Fed. Reg. 28802), effective June 30, 1978 (28 C.F.R. § 42.302(e)); Equal Employment Opportunity Commission Guidelines on Affirmative Action, adopted December 11, 1978, 29 C.F.R. Part 1608 effective January 11, 1979 (44 Fed. Reg. 4422) (see §§ 1608.4 and 1608.5 incorporating standards of the Department of Labor). State and local governmental entities have also included Asians in their affirmative action programs. See, e.g., Hiatt v. City of Berkeley, 149 Cal. Rptr. 155, 85 Cal. App.3d 29 (Cal. Ct. App. 1978); Hull v. Cason, 47 U.S.L.W. 2146 (Cal. Ct. App., Dec. 26, 1978) (fire department affirmative action programs in

Berkeley and Oakland, California, including Asians, held unconstitutional).

Without affirmative action, amici respectfully submit that the entrenched stigma of race and color once imposed by force of law will continue to handicap Asian Americans who seek to enjoy the guarantee of equal employment opportunity in the federal Constitution, statutes and executive orders. Absent such affirmative efforts by government and private employers, those guarantees will never be effectively and practically enforced. Government and private employers can and should examine whether their employment policies have the effect of denying equal employment opportunity because they have previously subjected a racial minority to

discrimination and exclusion from the economic life of the nation, cf. Gaston County v. United States, 395 U.S. 285, 293 (1969). Furthermore, government and private employers should initiate properly considered remedial measures to assure that their employment policies take account of artificial barriers which have their roots in prior discrimination and exclusion. It is clear that Asian Americans have been guaranteed equal opportunity for livelihood since 1886 when this Court declared that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unjust hand, so as practically to make unjust and illegal dis-

criminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution," Yick Wo v. Hopkins, 118 U.S. 356, 373-74. Permitting voluntary affirmative action programs, however, is necessary today to give life to that pledge.

Asian Americans as well as blacks were subjected to discriminatory legislation, notably in the field of employment, supra. Furthermore, this Court long ago recognized that the protections of the post-Civil War amendments and the civil rights acts were specifically intended to protect the rights of "Chinese coolie labor" as well as black freedmen, Slaughter House Cases, 83 U.S. 36 (1873), and that "the applica-

tion of the Amendment to the Chinese race was considered and not overlooked," United States v. Wong Kim Ark, 169 U.S. 649, 697-699 (1898) (citing legislative history of the civil rights acts and Fourteenth Amendment). The post-Civil War amendments were not intended to prohibit measures designed to remedy the effect of the nation's past treatment of racial minorities. The Congress that passed the Thirteenth and Fourteenth Amendments and early civil rights acts is the same Congress that passed the 1866 Freedmen's Bureau Act, which provided many of its benefits and protections only to black freedmen then subject to the Black Codes, University of California Regents v. Bakke, supra, 57 L.Ed.2d at 838-39

(1978) (Marshall, J.). "Such a result would pervert the intent of the framers by substituting abstract equality for the genuine equality the amendment was intended to achieve," id.

Title VII recognizes that Asians and other minority workers are still "relegated to the lowest paying, least desirable jobs--if indeed, they get hired at all," 118 Cong. Rec. 294 (1972). "Executive, judicial, and congressional actions subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race," University of California Regents v. Bakke, supra, 57 L.Ed.2d at 811 n.28. "Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and

rejected proposals to alter Executive Order 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action," id.

Last, the EEOC and other federal agencies, which recognize that Asians are a group entitled to the protections of executive orders and other civil rights guarantees, have also sanctioned affirmative action employment programs, supra. The new EEOC Guidelines on Affirmative Action, adopted for the express purpose of effectuating "the clear Congressional intent to encourage voluntary affirmative action," 29 C.F.R. § 1608.1(a), declare "the principle that each person subject to Title VII should take voluntary

action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation," 29 C.F.R. § 1608.1(c).

To use the Constitution and civil rights statutes and laws as a sword against such efforts would be to stultify the purpose of those guarantees, cf. Railway Mail Association v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

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